

Town of Amherst
Zoning Board of Appeals – Appeal of Decision of Building Commissioner

DECISION

Applicant: Howard Ewert, 284 North Pleasant Street, Amherst, MA 01002

Date application filed with the Town Clerk: August 3, 2004

Nature of request: Appeal decision of Building Commissioner regarding lot coverage at 19 McClellan Street, (Map 11C, Parcel 176, R-G Zoning District) as stated in July 7, 2004 letter from Barry Del Castilho, Town Manager.

Legal notice: Published on August 25 and September 1, 2004, and sent to abutters on August 19, 2004.

Board members: Zina Tillona, Joan Golowich, David Stowell

Submissions: Six sets of documents were submitted concerning the appeal:

1. The petitioner submitted the following documents with the application on August 3, 2004:

- Letter from the Building Commissioner to Mr. and Ms. Ray, stating that before work on a new curb cut and driveway is started a “detailed site plan” be submitted, dated June 3, 1997. (A “registered surveyor” not stipulated.)
- Letter from Mr. Ewert to the Building Commissioner, asserting that the Building Commissioner had not followed agreements from an earlier meeting in 2001 and including a “sample letter” that the Building Commissioner could send to Mr. Ray, dated March 7, 2001.
- Letter from the Building Commissioner to Mr. Ray, owner of 19 McClellan Street, requesting a plan from a “Registered Land Surveyor” with necessary calculations to determine if a violation had occurred, dated March 20, 2001.
- Site plan of 19 McClellan Street, stamped by James Smith, Registered Land Surveyor, undated, received by Building Commissioner May 7, 2001
- Letter from the Building Commissioner to Mr. Ewert stating that lot coverage is not exceeded for 19 McClellan Street, dated May 8, 2001
- ZBA denial of Mr. Ewert’s appeal of the Building Commissioner concerning a request for zoning enforcement for 19 McClellan Street, filed June 28, 2001
- Report from Killam Associated, Consulting Engineers, analyzing surveyor Smith’s calculations of lot coverage at 19 McClellan Street, dated April 4, 2002
- Letter from the Town Manager to Mr. Ewert, dated July 7, 2004
- “Background” document from Mr. Ewert, dated July 27, 2004
- Letter to the ZBA from Mr. Ewert, dated July 27, 2004

2. The following documents were submitted by the Zoning Staff:

- A memo concerning additional background of Mr. Ewert's complaints, dated September 2, 2004, revised September 4, 2004 following a conversation with Mr. Ewert concerning details of ten years ago.
- A chronology of Mr. Ewert's appeals, dated September 2, 2004
- A description of McClellan Street width, from the Town Engineer.
- Copies of Special Permits granted to Mr. Ewert concerning renovation and parking for 15 McClellan Street, dated April 1994, and April, 1996. In 1994, a driveway was shared between 15 & 19 McClellan; in 1996, the driveway was under litigation.

3. Frank Ray, 19 McClellan Street submitted the following documents September 8, 2004:

- A letter from attorney Jeffrey Brown, dated May 12, 1994, stating that there are no deeded rights-of-way concerning a driveway, and that the Purchase and Sale Agreement indicates that access to 15 McClellan Street be obtained via 284 North Pleasant Street.
- A site plan dated October 25, 1995 with dimensions of the lot, land area, and coverage of house and parking. The plan is not made or stamped by a surveyor.
- A letter from the Building Commissioner to Mr./Ms. Ray, dated June 3, 1997. This is the same letter that Mr. Ewert submitted, but include notations that an application for a curb cut and new driveway was submitted September 7, 1995, that a permit (#19 FY1996) was issued to Mr. Ray on October 30, 1995, and the permit re-issued on October 27, 1999.
- An invoice from Harold Eaton & Associates, dated July 14, 1999 for a survey and setting boundary pins at 19 McClellan Street.
- An invoice from James A. Smith for a zoning plan for 19 McClellan, dated May 5, 2001. The Board had received this plan from Mr. Ewert.

5. Kristi Bodin, Assistant Town Counsel, submitted a legal opinion concluding that the petitioner's appeal should be denied, dated September 7, 2004.

6. Mr. Ewert responded to Ms. Bodin's legal advice, refuting her opinion in a four page, nine-point document submitted at the hearing, September 9, 2004.

Site Visit: September 7, 2004

At the site visit, the owners of 19 McClellan Street, Frank and June Ray, showed the Board members the current driveway on the westerly side of their property, with a gravel parking area behind their house. The driveway and parking appeared to be adequate for the building's use as a three-unit rental. A small shed stood in the northwest corner of the lot. The barn shown on the submitted site plan drawn by Jim Smith in 2001 had been removed. The property is substantially larger than the adjacent lot to the east. The neighborhood consists of modest 19th century wood-framed houses set on small lots that are non-conforming in terms of area and frontage according to required dimensions of the current Zoning Bylaw.

At 15 McClellan, the petitioner showed the Board the remains of a driveway, part of which had been located on 15 McClellan, before it became his property in 1998. (Formerly the property had been owned by Charles & George Ray, brothers of Frank Ray.) The larger part of the driveway was situated on 19 McClellan, but is no longer evident, replaced in part by a sidewalk. A low, approximately two-foot high fence is located along the boundary between the two properties.

Public Hearing: September 9, 2004

Prior to the public hearing, Mr. Ray telephoned the ZBA office and said that he cannot drive at night, and is unable to attend the hearing. He faxed the documents listed above to the Board instead.

At the public hearing Mr. Ewert listed the documents that had been submitted. The Board confirmed that they were in possession of all documents.

The petitioner then produced a large hand-drawn map of the three relevant properties – his two at 284 North Pleasant and 15 McClellan, and 19 McClellan Street. With a colored removable strip, he showed the driveway, part of which was on 15 McClellan, then moved it over to the current location on the westerly side of 19 McClellan. He stated that the historic driveway would have been legal, but Mr. Ray wanted his own driveway at #19.

The Board asked the petitioner that if he was aggrieved by Mr. Ray's decision to have his own driveway, why he did not appeal it in land court.

The Petitioner stated that the Town approved everything Mr. Ray had done (the driveway relocation), but Mr. Ray had not provided enough information for the Town to give such approval. Hence the appeal to the Town. Mr. Ewert said that he feels that Mr. Ray should have complied with the Bylaw in terms of lot coverage. He said that the former Building Commissioner, Bill Start, had asked Mr. Ray several times for a surveyed plot plan, and that Mr. Start had promised he'd take Mr. Ray to court if he did not provide the information.

The Board asked if the petitioner had a quarrel with the ZBA FY2001-000034 decision, which determined that the Building Commissioner's actions had been appropriate and sufficient in this case. Mr. Ewert replied that the ZBA decision was "okay", but that Mr. Start did not receive the information with the calculations of lot coverage.

The Board then asked the current Building Commissioner, Bonnie Weeks, whether Mr. Start really received the proper information. Ms. Weeks, who had been Assistant Building Commissioner in 2001, said that the 2001 survey was stamped by a Registered Land Surveyor and accepted. She stated that Mr. Ewert was immediately notified, but he did not appeal the acceptance of the plan by the Building Commissioner at that time.

The petitioner responded that Mr. Start had told him that if he was not satisfied, to get his own survey.

The petitioner declared that one needs a formula for calculating maximum lot coverage. The Board asked Mr. Ewert what, in his mind, was the formula. He replied that it was the ratio of non-turf area (buildings plus driveway, parking area, sidewalk) to the total lot size – i.e., total covered area divided by the lot area. He questioned whether Mr. Ray gave the Town the complete information to determine lot coverage.

The Board noted that lot information with the same formula was on Jim Smith's surveyed plan submitted by Mr. Ray in 2001, and asked if the petitioner is contesting the survey.

Mr. Ewert stated that he has no issue with the survey, and he doesn't want to talk about the surveyor. But he said that he has provided the Building Commissioner and the Board with a report compiled by Killam Associates in 2002 that concluded that the 2001 survey calculation does not comply with the By-Law (Section 6.18 defining lot coverage).

The Board noted that, as readers of relevant history concerning the contested driveway, they have the following information.

1. A 1994 letter by Jeffrey B. Brown, attorney for the former owners George and Charles Ray of 15 McClellan, clearly states that the owners were not obligated to provide a right-of way for property (19 McClellan) that they didn't own, and that the Buy-Sell Agreement did not contain such a right-of-way provision over their brother Frank's property at 19 McClellan St. Mr. Ewert ultimately signed this Buy-Sell Agreement.
2. The 1994-36 ZBA Conditions require a right-of-way be granted by the petitioner (who already owned 284 N. Pleasant) for 15 McClellan to cross over the 284 N. Pleasant property. The 1994 decision stated that 284 N. Pleasant and 15 McClellan had shared access to parking for 100 years via 284 N. Pleasant Street and could continue to do so with a right-of-way on the easterly side of 15 McClellan.
3. The petitioner had litigated before buying the property at 15 McClellan, wanting use of the contested driveway along the adjacent lot lines 15 & 19 McClellan, but the Court decided against the petitioner as to that driveway

The Board then asked that if the petitioner wants to quarrel with his next door neighbor, why come to the Zoning Board? Mr. Ewert replied that only the Zoning Board of Appeals can solve this matter and that the Building Commissioner needs to enforce the Bylaw (concerning coverage.) Mr. Ewert's opinion is that the surveyor in 2001 didn't use the right numbers in calculating lot coverage. The size of the lot listed by the surveyor does not match that of the Town Assessor, he said. Moreover, the surveyor used the wrong formula and put a wrong number for "lot area". The Board noted that the survey is in fact the basic point of contention for Mr. Ewert

Mr. Ewert said that the ZBA in 2001 had "made a promise for future action for information." The Board replied that they had read the decision and did not find such a promise.

The Board asked if the petitioner actually measured the lot size at 19 McClellan, and the petitioner said no.

Mr. Ewert stated that if the property was non-conforming for lot coverage (in 1997?) why didn't Frank Ray seek a Special Permit with the ZBA before making changes to his driveway. He further stated that the Town of Amherst has authorized Frank Ray's actions, and therefore has taken away his own ability to win an appeal in another arena.

The Board noted that it does not have the expertise to determine whether lot coverage was calculated incorrectly.

The Building Commissioner stated that Killam Associates did not conduct a survey, and did not provide inaccuracies. They did not take measurements, and Killam could only react to the plan completed by Jim Smith in 2001. She noted a previous survey had been done by Harold Eaton, on which Jim Smith based his measurements. (The Board obtained a copy of the Eaton invoice, submitted by Frank Ray.)

The Building Commissioner further stated that she is not a registered surveyor, and so will not dispute a signed plan. In addition, she said that Mr. Ray obtained a demolition permit to remove the barn (336 sq. ft.) shown on the 2001 plan, so lot coverage is now different.

Mr. Ewert stated that he felt that the Building Commissioner should have taken "more appropriate action" and asked for explanations of how lot coverage was calculated. He said that, for example, Mr. Smith may not have included measurements of roof overhang in his coverage figures. He said that he, as a taxpayer, has to rely on the Building Commissioner to do the right thing.

One member of the public spoke to this appeal. Ric McGuin, formerly of 24A McClellan Street, now Canton Avenue, asked that the Board listen to Mr. Ewert's arguments.

David Stowell moved to close the hearing. Joan Golowich seconded, and the vote was unanimous to close.

Public Meeting:

The Board stated that this dispute is not an issue for the ZBA. It is not in their authority to dispute a signed survey plan. They noted that procedurally, there is no way they can deal with "should have" complaints that were not appealed at the proper time. The Board cannot go back and recreate a 10-15 year history, and the Building Commissioner cannot dispute a surveyor's findings.

The Board concurred that while there may be issues involved in this case that another forum can address, an appeal to the ZBA is the wrong venue for the petitioner's

complaints.

The Board Chair stated that she had thought a lot about this issue, and found it frustrating, but the Board does not have authority to pass judgment in this case.

The Building Commissioner stated that Mr. Ewert could have appealed the survey and actions of the former Building Commissioner within the required 30-day time frame, and then had another survey performed if he felt the survey was inaccurate.

Mr. Ewert said that Mr. Start said to "get a survey", but didn't say to file an appeal. He thought he was doing the right thing.

Zoning Board Decision:

David Stowell moved to deny the appeal; Joan Golowich seconded the motion.

For all of the reasons stated above, the Board VOTED unanimously to DENY the appeal of the Building Commissioner's actions regarding lot coverage on the premises at 19 McClellan Street, (Map 11C /Parcel 176, R-G Zoning District) as stated on the July 7, 2004 letter from Barry Del Castilho, Town Manager.

ZINA TILLONA

JOAN GOLOWICH

DAVID STOWELL

FILED THIS _____ day of _____, 2004 at _____,
in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2004.
NOTICE OF DECISION mailed this _____ day of _____, 2004
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2004,
in the Hampshire County Registry of Deeds.